STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

In re:	)	**1998 OAL Determination No. 25**
	)	
Request for Regulatory Determination filed by RICHARD P. HERMAN, ESQ., regarding the BOARD OF CORRECTIONS, application of Title 15, California Code of Regulations, section 1107, to the remodeling of existing jails[1]	)	**[Docket No. 91-030]**
	)	**October 1, 1998**
	)	**Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: **EDWARD G. HEIDIG, Director**

HERBERT F. BOLZ, Supervising Attorney
TAMARA J. PIERSON, Administrative Law Judge on Special Assignment
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law ("OAL") has been requested to determine whether the *application*, by the Board of Corrections, *of a regulation* pertaining to pilot projects, *to* the remodeling of *existing jails*, was an *amendment* of the regulation and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that the application by the Board of Corrections was *not an amendment* of that regulation; it was simply a restatement of the existing regulation; therefore, it did not meet the second part of OAL's two-part test of a

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"regulation" and did not have to be adopted in compliance with the APA.

ISSUE

The issue presented to the Office of Administrative Law ("OAL") is whether the application, by the Board of Corrections, of Title 15, California Code of Regulations, former section 1107[2], to the remodeling of *existing* jails, was an *amendment* of the regulation and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").[3]

ANALYSIS

I. BACKGROUND

On August 13, 1991, Richard P. Herman, an attorney representing the class of prisoners in the Kern County Jail litigation, requested a determination by OAL whether the Board of Corrections ("BOC") *amended* section 1107, Title 15, CCR on July 18, 1991, when it applied that regulation to existing jails.

Mr. Herman claimed it was clear both from the language of section 1107 and JSO ("Jail Standards and Operations Division, BOC") Operations Bulletin #90.02 that pilot projects were only to be used when planning or constructing a *new* jail.

The Executive Director of the Board of Corrections, Thomas E. McConnell, responded that the wording of the regulation was deliberate to allow it to be applied to existing buildings or new designs. To apply it to an existing building was not a "variance" or an "underground regulation."

II. IS THE APA GENERALLY APPLICABLE TO THE BOARD OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

For purposes of the APA, Government Code section 11000 defines the term "state agency" as follows:

"As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, department, division, bureau, *board*, and commission."[Emphasis added.]

The APA narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative branch of state government."[4] The Board of Corrections ("BOC") is not part of either the judicial or legislative branches of state government.[5] The BOC is clearly a "state agency" within the meaning of the APA.

The BOC has the authority to establish minimum standards for local detention facilities and to expend money from the County Jail Expenditure Fund for the "construction"[6] of such facilities.[7]

III. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision of Government Code section 11342, subdivision (g), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application *or* the *amendment*, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has

been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,[8] the California Court of Appeal upheld OAL's two-part test[9] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. Furthermore, when applying the two-part test, OAL is guided by the principle set forth by the court in *Grier*:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]"[10]

A. IS THE "CHALLENGED APPLICATION" OF THE REGULATION A STANDARD OF GENERAL APPLICATION?

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[11]

Section 1107, Title 15, CCR, as it existed at the time this request for determination was filed, stated:

> "Whenever a city, county, city and county, or any combination thereof intends to develop a facility which requires an extreme departure from these building regulations for the purpose of experimenting with building systems and/or new designs, the Board of Corrections may grant that facility status as a pilot project on application. Such an application for a Pilot Project status shall contain, at a minimum, the following information:
>
> (a) The regulations which Pilot Project status will affect.
>
> (b) Criteria and documentation that the safety of staff and inmates will not be jeopardized.
>
> (c) A statement of the goals the pilot project is intended to achieve.
>
> (d) A progress reporting process, to the Board of Corrections, which evaluates the attainment of goals or the progress toward goal attainment.
>
> (e) Any additional information or explanation that will assist the Board of Corrections to arrive at a decision."

Whether this regulation applies solely to the development of new facilities or to the development of both new and existing facilities, the regulation is clearly a standard of general application because it applied to all the members of the class who sought status as a pilot project to enable them to experiment with building systems and designs of local facilities.

B. DOES THE "CHALLENGED APPLICATION" OF THE REGULATION IMPLEMENT, INTERPRET, OR MAKE SPECIFIC THE LAW ENFORCED BY THE BOARD OF CORRECTIONS?

Certain rules of statutory construction guide a court's consideration of a statute. A general rule of statutory construction is that, "[i]f the language is clear, there can be no room for interpretation; effect must be given to the plain meaning of the words."[12] The California Court of Appeal in *Johnston v. Department of Personnel Administration* (1987)[13] summarized its responsibilities related to statutory construction as follows:

> "Certain rules of statutory construction guide our consideration. In *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, 110 Cal.Rptr.

144, 514 P.2d 1224 the court stated: 'We begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." . . . We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them."[Citations.]'"

"As a general rule of statutory construction, if a statute announces a general rule and makes no exception thereto, the courts can make none. (*Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal. 2d 469, 476, 304 P.2d 7). A court may not insert into a statute qualifying provisions not included or rewrite a statute to conform to an inferred intention that does not appear from its language. (*Mills v. Superior Court* (1986) 42 Cal.3d 951, 957, 232 Cal.Rptr. 141, 728 P.2d 211.)"

The same rules that govern statutory construction also apply to regulations.[14]

The requester contends that the language "*to develop a facility*" in section 1107 means a *new* facility. However, that reading of the language requires the insertion of a word that is not present in the regulation.

Section 1107 is located in Article 8, entitled "Initial Planning for a Local Detention Facility." A review of the other sections in this Article reveals that the sections refer to *both new construction and the remodeling of existing facilities*. To limit section 1107 to new construction only would set it apart from the other sections in this Article. Without specific language in the section limiting it to new construction, it would appear to apply to both new construction and the remodeling of existing facilities, just as the other sections apply to both. To limit the words "develop a facility" to mean "to develop a *new* facility" would violate the rule of "*plain meaning*" of the language. Given the context of the Article, the plain meaning of "to develop" means "to develop by new construction or remodeling of an existing facility."

The requester also contends that the language in section 1107 "for the purpose of *experimenting with building systems and/or new designs*" makes clear that the section is limited to new construction. This interpretation of this language, once again defies the rule of plain meaning of the language and takes the language out of context. Experimenting with building systems or designs can as easily be read to refer to the remodeling of an existing facility as to new construction; and given

the context of the Article, the plain meaning rule requires the language be interpreted to apply to both new construction and the remodeling of an existing facility.

The authority cited for section 1107 was Penal Code section 6030 and the reference was Penal Code section 6029. Penal Code section 6029.1, subdivision (b), *defines "construction" to include* reconstruction, *remodeling*, and replacement of facilities. This further buttresses the view that section 1107 applied to both new construction and remodeling of existing facilities.

JSO Operations Bulletin #90.02 issued April 24,1990 stated:

> "At its March 28th meeting the Board of Corrections agreed to review Pilot Projects by counties for a reduced level of single cells when planning or constructing a *new* facility. As you are likely aware the present standard requires counties *to construct* to the lesser of 33% of its total detention population or 60% of its pretrial population. . . it is extremely important that *other county facilities* be involved in this research element . . ." [Emphasis added.]

The requester argues that this bulletin makes it clear that the pilot projects were to apply only to new construction. This bulletin refers to the construction of new facilities, but it also uses the generic term "construct" which applies to both new construction and remodeling; and it states it is important that other county facilities be involved. Hence, the bulletin is not inconsistent with the Board's interpretation that the regulation (section 1107) refers to both the construction of new facilities and the remodeling of existing facilities.

In fact, on July 18, 1991, the very first counties to present requests to the Board for approval as pilot projects, were projects which involved existing facilities rather than new facilities.[15] Apparently it was clear to the counties that section 1107 applied to both new and existing facilities. The Board's approval of those pilot projects was consistent with its view of section 1107. Thus, the very first time the Board had an opportunity to act upon section 1107, it applied it in a manner consistent with its view that the section applied to the remodeling of an existing facility.

OAL concludes that the application of former section 1107, by the BOC, to both

new facilities and the remodeling of existing facilities, *was within the plain meaning of the regulation*; therefore, it was merely a restatement of the law, not an amendment to the regulation. Accordingly, the second part of OAL's two-part test of a "regulation" has not been met.

CONCLUSION

OAL has concluded, that the *application* by the Board of Corrections, *of* former *section 1107, Title 15, CCR, to* the remodeling of *existing jails*, does *not* meet the second part of OAL's two-part test of a "regulation" because it did not interpret, implement, or make specific section 1107; it was merely a *restatement of the* existing *law*. Therefore, it did not have to be adopted in compliance with the APA.

DATE: October 1, 1998

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ENDNOTES

1. This Request for Determination was filed by Richard P. Herman, Counselor at Law, on behalf of the Prisoners Rights Union and the affected prisoners in jails throughout California, 229 Marine Avenue, Box 328, Balboa Island, CA 92662, (714) 673-7670. The response from the Board of Corrections was filed by Thomas E. McConnell, Executive Director, 600 Bercut Drive, Sacramento, CA 95814, (916) 445-5073.

2. Title 15, CCR, section 1107, repealer was filed August 4, 1994, operative September 5, 1994 (Register 94, No. 31). Section 1007, applying to pilot projects which evaluate innovative programs, operations or concepts, was filed as a new section on August 4, 1994, operative September 5, 1994 (Register 94, No. 31).

3. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400), *and Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act*." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

4. Government Code section 11342, subdivision (a).

5. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal. App. 3d 120, 126-128, 175 Cal. Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in the legislative or judicial branch must comply with the rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal. App. 3d 932, 943, 107 Cal. Rptr. 596, 603.

6. Penal Code section 6029.1, subdivision (b) states in pertinent part:

> ". . . 'construction' shall include, but not be limited to, reconstruction, *remodeling*, replacement of facilities, and the performance of deferred maintenance activities on facilities pursuant to rules and regulations regarding such activities as shall be adopted by the Board of Corrections." (Emphasis added.)

7. Penal Code sections 6029 through 6030.

8. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part.

Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677,67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

The *Tidewater* court, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

9. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published after *Grier*, in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

10. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

11. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

12. *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 818, 226 Cal.Rptr. 81, 85 (questioned on other grounds, *Farnham v. Superior Court* (1987) 60 Cal.App.4th 69, 70 Cal.Rptr.2d 85).

13. 191 Cal. App.3d 1218, 1223, 236 Cal.Rptr. 853, 856.

14. *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 504-505, 272 CR 886, 894: "Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of administrative regulations. (*Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287,292, 140 P.3d 657.)"

15. Kern County and Placer County were the first counties to present requests to the Board for approval as pilot projects.